



## Using the non-retrogression principle to prevent far-right erosion of rights

Gema Ocaña Noriega\*

**Abstract:** In Europe, far right political parties are introducing new legislation which represents a step backward in the progressive realisation of human rights. The principle of non-retrogression could be a useful tool in facing these challenges.

Spain underwent elections in July 2023. As in other [European countries](#), experts anticipated a clear win of the right and far right parties. Contrary to the prognosis, the extreme far right party Vox lost almost half of its seats, which has been seen by what political analysts view as [bucking](#) the European trend.

Despite the results, the [electoral programme](#) of the extreme far right party raised a lot of questions from a human rights perspective. In terms of gender equality, it proposed a number of legislative measures intended to abolish some of the country's most progressive laws. For example, it aimed to revoke the quota system created to tackle the gender gap, the '*solo sí es sí*' ('only yes means yes') legislation on sexual consent, plus laws for trans rights, abortion, equality and against gender violence, the last a pioneering piece of legislation unanimously approved by Congress in 2004 and

---

\*Gema Ocaña Noriega is a PhD candidate at Queen's University Belfast and member of the [Health and Human Rights Unit](#) where she is developing her PhD on Privatisation of Health Care and its compatibility with International Human Rights Law. She holds a European Master's Degree on Human Rights and Democratisation ([EMA](#)). Gema is a member of the Global Health Law Groningen [Research Centre](#) and works as senior advisor in [EU research affairs](#) at the University of Groningen.

considered as one of the most advanced statutes in the world. The party also intended to eliminate the Ministry of Equality and the violence against women ad hoc courts and cut funding support to all organisations working for equality or against gender violence; it had an equally repressive agenda on immigration and climate change.

We have seen similar examples in other European countries. In [Italy](#), for example, the city of Padua has started removing the names of non-biological gay mothers from their children's birth certificates under new legislation passed by the 'traditional family-first' government of Prime Minister Giorgia Meloni.

Against this background, we wonder whether there is any human rights mechanism able to protect the sphere of rights created by progressive legislation against new laws that entail a step backward. The principle of non-retrogression can be a useful tool. However, despite its potential, conceptual clarification and guidelines for practical application are needed.

### **The principle of non-retrogression**

The doctrine of non-retrogression is linked to the obligation to use the maximum available resources for the realisation of economic, social and cultural rights. According to the Committee on Economic, Social and Cultural Rights (CESCR) [General Comment No. 3](#), the principal obligation of result reflected in Article 2 (1) of the [ICESCR](#) is to take steps 'with a view to achieving progressively the full realisation of the rights recognized' in the Covenant. This realisation is progressive but there is an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, the Committee stated that

[A]ny deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

This phrase has been read as establishing a doctrine which forbids the erosion of progress made by signatory states, a 'prohibition on backwards steps'. As a signatory state commits to expanding coverage and protection of Covenant rights, it simultaneously assumes an obligation to refrain from annulling or reducing the existing level of protection of recognised rights. This seems especially useful for situations as the one described above, when new political regimes introduce new legislation erasing existing rights. However, the CESCR has not developed this doctrine enough and some authors have stated that there is a significant degree of ambiguity in the labelling and descriptions of the doctrine of non-retrogression.

### **Normative deliberate retrogressive measures**

According to [some authors](#) this prohibition of backwards steps in terms of the realisation of economic and social rights involves two dimensions: normative and empirical. The first one concerns steps backwards in terms of legal, de jure guarantees, while the second is concerned with de facto, empirical backsliding in the effective enjoyment of the rights. Another related difference is the one between retrogressive *measures* and retrogressive *effects*. In the case of normative retrogression, the backwardness is assessed in isolation from its actual effects.

The CESCR is unclear whether the measure or the retrogression must be deliberate for the doctrine to apply. However, the consensus seems to be that retrogression requires that both the backsliding and measure are deliberate. The aforementioned examples appear to try to suppress legislation aimed at extending the scope of protection in order to achieve equality, which fits the scenario of legal retrogressive measures. In most of those cases, it is relatively easy to demonstrate that state deliberately enacted such measures as they are usually linked to governmental statements denying human rights such as downplaying the level of violence against women - in Spain, 1,209 women have been murdered by their partners or ex-partners since 2003 - or discriminating against people because of their sexual orientation by stating that marriages and families can be only constituted by the union of a man and a woman.

A number of General Comments have highlighted that the adoption of any retrogressive measures is incompatible with the 'core obligations' under the Covenant and therefore impermissible, although in the General Comments No. 3 and 19 the Committee proceeded to outline in more detail some of the key factors it would consider when deciding whether a retrogressive measure was justifiable in terms of the Covenant. In order to gain a better insight of this principle, it is useful to provide a couple of examples of the non-retrogression principle in practice.

### **Non-retrogression in practice**

An example of CESCR use of the non-retrogression principle came within the context of the 2008 economic crisis. Given the austerity measures applied by different governments, the Committee's reluctance to clearly delineate the parameters of impermissible retrogressive measures or limitations in terms of economic and social rights has proved problematic. In her 2011 annual report, the UN Independent Expert (now Special Rapporteur) on the Question of Human Rights and Extreme Poverty highlighted that a number of economic 'recovery measures' taken by states, such as cuts to social protection systems, may violate the prohibition of retrogressive measures. However, it was not until May 2012 that the Committee engaged

with the crises and their implications for Covenant rights. That month, the Chairperson addressed a [letter](#) to member states on behalf of the Committee stating that 'economic and financial crises, and a lack of growth, impede the progressive realisation of ESC rights and can lead to retrogression in the enjoyment of those rights'. This statement was used by the CESCR in its annual reports by questioning some of the austerity measures taken by the states in the context of the economic crisis and asking them to engage with the principles of progressive realisation and non-retrogression.

National Courts provide interesting examples as well. In 2018, the Supreme Court of India delivered a historic judgement decriminalising consensual 'unnatural' intercourse between adults. In [Navtej Singh Johar & Ors. v. Union of India](#), the court was asked to determine the constitutionality of Section 377 of the Indian Penal Code, a law that criminalised homosexual acts as an 'unnatural offence'. The court unanimously declared the law unconstitutional and making use of the non-retrogression principle stated that there cannot be discrimination in law based on sexual orientation and gender as guaranteed by the constitution:

[T]here must not be any regression of rights. In a progressive and an ever-improving society, there is no place for retreat. Society has to march ahead. The doctrine of non-retrogression sets forth that the State should not take measures or steps that deliberately lead to retrogression on the enjoyment of rights either under the Constitution or otherwise.

### **Way forward**

The European political arena is experiencing a growth of the extreme far right. Within this context, the introduction of new legislation which curtails the progressive realisation of economic and social rights constitute a human rights concern. The principle of non-retrogression might need further development, especially from the side of the CESCR, but has great potential to help combat these urgent challenges and to protect human rights.